COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 193

WELDON WALTER NORMAN,

Petitioner,

vs.

STATE OF CALIFORNIA.

Petition for Writ of Certiorari to the State of California, and to the District Court of Appeal of the State of California, Second Appellate District.

RUSSELL E. PARSONS,
Suite 1111,
448 South Hill Street,
Los Angeles 13, California,
Attorney for Petitioner, Weldon Walter Norman.

The Myers Legal Press, Los Angeles. Phone MA. 5-8820.

SUBJECT INDEX

PAGE

Opinion below 2

Jurisdiction 2

Questions presented 3

Statutes involved 3

Statement of the case 4

Facts material to a consideration of the questions presented here 5

Manner federal question was raised 7

Summary of argument 7

Argument 8

I.

Whether a judgment of a state court should stand based upon evidence which was false, as indicated by police reports which indicated that a principal witness had given a description diametrically opposed to that given upon being questioned at the trial. Such reports were in possession of the State, and access to these reports was not given to appellant until after the conviction 8

II.

Is a defendant accorded his constitutional right to due process of law, where the record reflects the State has suppressed evidence, which evidence, brought to the attention of the trial court on motion for new trial, indicated a different result might have resulted had the evidence been available and not kept from the appellant 10

Conclusion 11

Appendix.

Opinion of the District Court of Appeal ..... App. p. 1

Texts of statutes ..... App. p. 13

TABLE OF AUTHORITIES CITED

Cases	Page
Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791	10
Napue v. Illinois, 360 U. S. 264, 3 L. Ed. 2d 1217	9, 10
People v. Cooper, 53 A. C. 759	8
Rules	
Rules for the United States Supreme Court, Rule 22(1)	3
Statutes	
California Penal Code, Sec. 207	3, 4
California Penal Code, Sec. 209	3, 4
California Penal Code, Sec. 211	3, 4
California Penal Code, Sec. 261.4	3, 4
California Penal Code, Sec. 664	3, 4
California Penal Code, Sec. 1334.3	4
United States Code, Title 28, Sec. 2101(d)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

WELDON WALTER NORMAN,

Petitioner,

vs.

STATE OF CALIFORNIA.

Petition for Writ of Certiorari to the State of California, and to the District Court of Appeal of the State of California, Second Appellate District.

Petitioner, Weldon Walter Norman, prays that a writ of certiorari issue to review a judgment of the District Court of Appeal, State of California, in and for the Second Appellate District, which said judgment of said District Court of Appeal affirmed a conviction of kidnaping for the purpose of robbery during the course of which the victim of the robbery was subjected to bodily harm in that she was raped. The penalty was fixed at life imprisonment without possibility of parole. In other counts, robberies were found to be of the first degree. The judgments as to the robberies were to run concurrently with the sentence of life imprisonment without possibility of parole. [See Judgment, Clk. Tr., p. 197, Record on Appeal.]

Opinion Below.

The Opinion of the District Court of Appeal of the State of California, Second Appellate District, Division Three thereof (an intermediate appellate court in California), was rendered January 8, 1960, and is reported in 1 Cal. Rptr. 699 (177 A. C. A. Reports, p. 58).

A petition for hearing in the Supreme Court of the State of California was timely filed with that court and by that court denied without opinion. (See Minutes, Supreme Court of California, March 1, 1960, reported at 53 Advance California Reports No. 10, Minutes, p. 2.).

Jurisdiction.

1. The judgment of the District Court of Appeal of the State of California, Second Appellate District, was dated and entered January 8, 1960, and is to be found reported in 1 Cl. Rptr. 699 (177 A. C. A. Reports, p. 58).

2. A petition for hearing in the Supreme Court of California was filed (see Petition for Hearing by Appellant, Record on Appeal). The said Petition for Hearing was by the Supreme Court of California denied March 1, 1960. (Minutes of said court are reported in the minutes of March 1, 1960, 53 Advance California Reports No. 10, Minutes, p. 2.)

3. Upon application to this Court an order extending time to file petition for writ of certiorari was granted May 20, 1960, extending time to and including June 20, 1960. Thereafter, upon application the time was extended by this Court within which time to file petition for writ of certiorari, to June 30, 1960.

4. The statutory provisions believed to confer upon this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 2101(d), and Rule 22(1) of this Court.

Questions Presented.

1. Whether a judgment of a state court should stand based upon evidence which was false, as indicated by police reports which indicated that a principal witness had given a description diametrically opposed to that given upon being questioned at the trial. Such reports were in possession of the State, and access to these reports was not given to appellant until after the conviction.

2. Is a defendant accorded his constitutional right to due process of law where the record reflects the State has suppressed evidence, which evidence, brought to the attention of the trial court on motion for new trial, indicated a different result might have resulted had the evidence been available and not kept from the appellant.

Statutes Involved.

Penal Code of California, Section 207;
Penal Code of California, Section 209;
Penal Code of California, Section 211;
Penal Code of California, Section 261.4;
Penal Code of California, Section 664.

The text of these statutes is set forth in the Appendix to this petition.

Statement of the Case.

By amended information filed by the District Attorney of the County of Los Angeles, State of California, in twelve (12) counts [Record on Appeal, Clk. Tr., pp. 15-31, incl.], your petitioner was charged in Count I with Kidnaping for the Purpose of Robbery, in violation of Section 209, Penal Code of California; in Count II, the crime of Robbery, in violation of Section 211, Penal Code of California; in Counts III, V, VII and IX, the crime of Rape, in violation of Section 261, Subdivision 4, Penal Code of California, in Counts IV, VI, VIII, X and XII, the crime of Kidnaping, in violation of Section 207, Penal Code of California; and in Count XI, the crime of Attempted Rape, in violation of Sections 664 and 261, Subdivision 4, Penal Code of California. Petitioner pleaded not guilty, and trial was had before a jury; the jury found the defendant guilty of all counts. [Record on Appeal, Verdicts, Clk. Tr., pp. 92-109].

A motion for new trial was made supported by affidavits, and the said motion for new trial was denied [Record on Appeal, Clk. Tr., p. 197]. In connection therewith, a motion for production of evidence and for a certificate, under Penal Code of California, Section 1334.3 was filed [Record on Appeal, Clk. Tr., p. 182] supported by an affidavit of then counsel for defendant-appellant [Record on Appeal, Clk. Tr., p. 184], supported by a document labeled, "Excerpts From Police Records Re: Cecelia Rae Stone Compared With Her Testimony" [Record on Appeal, Clk. Tr., pp. 185-186]. Motion for New Trial was by the court denied. [Record on Appeal, Clk. Tr., p. 187.]

Facts Material to a Consideration of the Questions Presented Here.

After the conviction new counsel were employed, and such counsel sought to inspect documents in possession of the State which were deemed essential in preparation for the motion for new trial. No discovery attempts had been made at the trial. Substituted counsel attempted to obtain, after the conviction, records of the District Attorney [Record on Appeal, Clk. Tr., p. 162], the Sheriff of the County of Los Angeles [Record on Appeal, Clk. Tr., p. 168], and the Glendale Police Department [Record on Appeal, Clk. Tr., p. 170]. The Glendale Police Department complied [Record on Appeal, Rep. Tr., Vol. 4, p. 1015]. The District Attorney of Los Angeles County moved to quash the subpoena [Record on Appeal, Rep. Tr., Vol. 4, p. 2, line 23]. The trial court denied discovery, stating: "This is a procedural matter and motions not timely made are waived." [Record on Appeal, Rep. Tr., Vol. 4, p. 5; line 13.]

Some of the information sought and in possession of the police and to which the defendant had no access during the trial, evidence which must have been known by the District Attorney, is contained in a document presented to the trial court labeled, "Excerpts From Police Records Re: Cecelia Rae Stone Compared With Her Testimony." [Record on Appeal, Clk. Tr., pp. 185-186]. The evidence proposed at the motion for new trial is as follows [Record on Appeal, Clk. Tr., p. 185, line 19, to p. 186, line 26]:

> "The victim testified that the man took her through the apartments on Glenoaks to his car (RT, Vol. I, 117:20-23; 119:2-5).
>
> "The Police Report by P. E. Copeland of Glendale Police Department states: 'The four of us

in the police car (officers Magallanes & Handley, P W Copeland and the victim) got out and walked between all of the apartment houses in this block on Glenoaks but were unable to get on any street as they were all blocked in at the rear by a high wooden fence). Victim knows this part of the City very well but could not tell us if the car was parked on a street or a lot.' (dated 1/2/58, 1/22/58)

"Another quotation from the same report is as follows:

'There were many discrepancies in victim's story: She told the investigating officers that suspect had a snap blade knife and that she saw it, she finally admitted that she did not see a weapon of any kind. She told the investigating officers that suspect had pulled her head down by her hair when he first made her get into the car; later she said he threw a blanket over her head until the time that they were crossing Glenoaks on Highland on the way to the hills. Also many, many more.'

"And another excerpt:

'Parents of victim and all officers concerned are of the same opinion that victim was not forced into a car and that she knows the fellow involved in this act with her.'

"As to identification of the automobile, her testimony was that it was a 52 or 53 Cadillac (RT 130/8). The statement from the police investigation is as follows:

'She was shown the Automobile Mug Book (with year of car obscured from her view) and unhesitatingly picked out a 1956 Cadillac as the car driven by the suspect. The girl appeared to

have a good knowledge of cars and picked out and named the year of other Cadillacs when year was hidden from her view.'

"On January, 23, 1958, two days after alleged crime, the victim's mother phoned the police department that victim had just seen a 1955 Cadillac that looked like the car she was attacked in and the license No. was BJY, numbers unknown. A teletype from the Motor Vehicle Department revealed five other Cadillacs from 50 to '53 with licenses numbered BJY. The license number of defendant's automobile was JNK."

Manner Federal Question Was Raised.

The Federal question, that is, was due process of law violated by the acts of the trial court in denying an opportunity to bring to the attention of the court the evidence which had been in possession of officers of the State and had not been brought forward, was raised on the motion for new trial [Record on Appeal, Clk. Tr., pp. 82-187, incl.; p. 197].

Summary of Argument.

Briefly stated, this was largely a question of identification. The police had in their possession statements by an identifying witness that cast grave doubt upon the veracity of the witness. It appeared the witness was untruthful. These reports must have been in the possession of the District Attorney. They at least were in possession of a representative of the State. The conviction was obtained in part upon false testimony, and knowledge of the falsity of such testimony was kept from the defendant and was not discovered until new counsel appeared in the case, after the verdict, and the matter was brought to the attention of the trial court at the time of the motion for new trial.

ARGUMENT.

I.

Whether a Judgment of a State Court Should Stand Based Upon Evidence Which Was False, as Indicated by Police Reports Which Indicated That a Principal Witness Had Given a Description Diametrically Opposed to That Given Upon Being Questioned at the Trial. Such Reports Were in Possession of the State, and Access to These Reports Was Not Given to Appellant Until After the Conviction.

In the interest of brevity we will not here repeat the pertinent evidence, but it now appears that the District Attorney was aware of evidence which demonstrated that there was a marked discrepancy in the testimony of the witness, as is indicated by the document showing excerpts from the Glendale Police Report and the witness's testimony. The defendant and appellant was denied an opportunity to present this evidence to the trial court; the court asserting that the motion came too late.

It is our contention that where the defense have absolutely no knowledge of the statements in the possession of the police or the district attorney, the defendant is not permitted to go on a fishing expedition. The defendant in a criminal case has to show some better cause for inspection of documents and evidence under the discovery rule than mere desire to determine the strength of the People's case. This was held in *People v. Cooper*, 53 A. C. 759.

The defendant, your petitioner, did not discover these facts until new counsel appeared in the case, and then it

was brought to the attention of the court on the motion for new trial and the court denied the same, as heretofore recited, but it is significant that the District Attorney moved to quash the subpoena. Why hide from the court this evidence? It is our contention that this defendant, your petitioner, was denied due process.

See *Napue v. Illinois*, 360 U. S. 264, 3 L. Ed. 2d 1217, at 1221, where the Court said:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle facts as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, *People v. Savvides*, 1 NY 2d 554, 557, 154 NYS 2d 885, 887, 136 NE 2d 853, 854, 855:
>
> > 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'"

As was said in *Napue v. Illinois, supra,* this does more than to go to the credibility of a witness. This went to the very identity of the witness, and as the Court there said, "a lie is a lie".

II.

Is a Defendant Accorded His Constitutional Right to Due Process of Law Where the Record Reflects the State Has Suppressed Evidence, Which Evidence, Brought to the Attention of the Trial Court on Motion for New Trial, Indicated a Different Result Might Have Resulted Had the Evidence Been Available and Not Kept From the Appellant.

It is our contention that there was a denial of due process, and further it denied this defendant a fair trial. It is reasonable to believe that a different result might have been obtained had these serious discrepancies in this witness' testimony been brought to the attention of the jury.

As was said in *Napue v. Illinois, supra,* at p. 1221:

> "The principle 'that a State may not knowingly use false evidence, including false testimony, to obtain a tainted verdict, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witnesses."

See also,

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791.

Conclusion.

Wherefore, petitioner respectfully prays that a writ of certiorari be granted directed to the State of California, to the end that a full hearing may be had herein, and to the end that this petitioner in the alternative may be discharged, and for such other and further relief as to the Court may seem meet and just.

Respectfully submitted,

RUSSELL E. PARSONS,

Attorney for Petitioner, Weldon Walter Norman

APPENDIX.

Opinion of the District Court of Appeal.

[Crim. No. 6674. Second Dist., Div. Three. Jan. 8, 1960.]

The People, Respondent, v. Weldon Walter Norman, Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Richard C. Fildew, Judge. Affirmed.

Prosecution for kidnaping for the purpose of robbery, kidnaping, attempted kidnaping, rape, attempted rape and robbery. Judgment of conviction affirmed.

Gladys Towles Root, Eugene V. McPherson and Robert Barnett for Appellant.

Stanley Mosk, Attorney General, and Norman H. Sokolow, Deputy Attorney General, for Respondent.

VALLÉE, J.—By information defendant was charged in two counts with kidnapping for the purpose of robbery in violation of section 209 of the Penal Code, in five counts with kidnaping in violation of section 207, in one count with attempted kidnaping in violation of sections 207 and 664, in six counts with rape in violation of section 261, subdivision 4, in one count with attempted rape in violation of sections 261, subdivision 4, and 664 and in two counts with robbery in violation of section 211.

A jury found defendant guilty on all counts except one of kidnaping for the purpose of robbery (XIV). As to count I, kidnaping for the purpose of robbery, the jury found defendant kidnaped and carried away a married woman for the purpose of committing robbery, that he

subjected her to bodily harm in that she was raped, and fixed the penalty as life imprisonment without possibility of parole. The robberies were found to be of the first degree. The judgment as to count I was imprisonment for the term of defendant's natural life without possibility of parole; with respect to the other counts on which he was found guilty, imprisonment for the term prescribed by law, the sentences as to the other counts to run concurrently with the sentence as to count I.

Defendant appeals from the judgment and an order denying his motion for a new trial. He does not challenge the sufficiency of the evidence to sustain the verdicts. His first assignment of error is that he was denied due process of law in that the court denied his motions, made after the verdicts had been rendered, for production of documents in the possession of the People.

The verdicts were returned on July 2, 1958. On August 1, 1958, new counsel for defendant was associated with the attorney who had tried the case and a motion for a new trial was made. Various continuances of the motion for a new trial were had. On September 11, 1958, new counsel filed a notice of motion for inspection of certain documents. On December 15, 1958, new counsel filed another notice of motion for "Production of Evidence and for Certificate under P. C. §1334.3." The motion sought an order "to compel the production of certain documents, police reports, complaints to police and sheriff offices, and medical and hospital reports all concerning the various complaining witnesses in the above entitled action and as more specifically enumerated in the Subpoenas Duces Tecum and affidavits therefor heretofore filed in this matter." The *subpoenas duces tecum* referred to had been issued by the county clerk

and were directed to the district attorney, the Los Angeles Police Department, the Glendale Police Department, and various hospitals, commanding the production of the same documents. The Glendale Police Department voluntarily gave counsel for defendant a copy of the reports sought from it. On December 16, 1958, the motions for orders requiring the production of the documents were denied. On January 29, 1959, the motion for a new trial was denied.

Defendant's complaint is that by the ruling denying production of the documents he was precluded from developing legal grounds in support of the motion for a new trial. No motion or request for production or inspection of the documents was made prior to or during the trial.

It is settled in this state that *prior to trial and during the course of the trial* an accused can compel the People to permit inspection and copying or to produce in court: written statements of the accused (Powell v. Superior Court, 48 Cal. 2d 704, 705-9 [312 P.2d 698]; McAllister v. Superior Court, 165 Cal. App. 2d 297, 299-301 [331 P. 2d 654]; transcripts of recorded statements of the accused (Powell v. Superior Court, *supra*; Cash v. Superior Court, [1]53 Cal. 2d —— —— [346 P. 2d 407]); written statements of prosecution witnesses relating to matters covered in their testimony (People v. Riser, 47 Cal. 2d 566, 585 [305 P. 2d 1]; People v. Chapman, [2]52 Cal. 2d 95, 98 [338 P. 2d 428]; People v. Silberstein, 159 Cal. App. 2d Supp. 848, 849-852 [323 P. 2d 591]); written statements of prosecu-

[1]Advance Report Citation: 53 A. C. 73, 75.
[2]Advance Report Citation: 52 A. C. 94, 97.

tion witnesses relating to matters covered in their testimony at the preliminary hearing (Tupper v. Superior Court, 51 Cal. 2d 263, 265 [331 P. 2d 977]); transcripts of tape recordings of statements made by the accused and by prosecution wittnesses (Powell v. Superior Court, *supra*; People v. Cartier, 51 Cal. 2d 590, 594 [335 P. 2d 114]); transcripts of statements used by the prosecution in impeaching an accused's witness (People v. Carter, 48 Cal. 2d 737, 752 [312 P. 2d 665]; notes made by police officers of their conversations with prosecution witnesses (Funk v. Superior Court, [3]52 Cal. 2d 423, 424 [340 P. 2d 593]); photographs which had been exhibited to the victim of a robbery for the purpose of identifying the robber (Norton v. Superior Court, [4]173 Cal. App. 2d ——, —— —— [343 P. 2d 139]); names and addresses of eyewitnesses to a crime (Norton v. Superior Court, *supra*); documents in the possession of the People which are relevant and material to the defense (People v. Chapman, *supra*). An accused may also compel permission to hear recordings of the accused's conversations with police officers and of conversations between police officers and the purported victim. (Vance v. Superior Court, 51 Cal. 2d 92, 93 [330 P. 2d 773]; People v. Cartier, *supra*.) No authority is cited and we have found none holding that a defendant who is aware, during the course of trial, of the existence of documents in the possession of the People which may be relevant and material to the defense and who takes no action to compel inspection or copying or production of them, has a right, after an unfavorable verdict, to compel their production.

---

[3]Advance Report Citation: 52 A. C. 436, 437.

[4]Advance Report Citation: 173 A. C. A. 163, 165-167.

"The basis for requiring *pretrial* production of material in the hands of the prosecution is the fundamental principle *that an accused is entitled to a fair trial.*" (Cash v. Superior Court, *supra*, [1]53 Cal. 2d ——, ——. Emphasis added.) "The value to defendant of seeing the statements made by the witnesses is that to do so might enable him to impeach their testimony *at the trial.*" (Tupper v. Superior Court, *supra*, 51 Cal. 2d 263, 265. Emphasis added.)

People v. Sauer, 163 Cal. App. 2d 740 [329 P. 2d 962], was a prosecution for forgery. With respect to inspection of documents, the court stated (p. 743):

"Appellant next contends that the trial court abused its discretion in not permitting pretrial inspection of the handwriting expert's report. The court denied the motion without prejudice to a renewal of the motion at the trial if it became necessary. It is contended that the basis of the prosecution's case was the testimony of the handwriting expert and that without an opportunity to examine it before trial the defense could not adequately prepare to meet it. The motion was not renewed at the trial. Pretrial inspection of reports in the hands of the prosecution is not a matter of right in all cases. The record does not show that a motion for inspection was made at the trial. Under such circumstances we do not believe that appellant is in a position to raise the point on appeal." (Also see People v. Day, 159 Cal. App. 2d 572, 575-577 [323 P. 2d 1051]; People v. Atchley, [2]53 Cal. 2d ....., ... [346 P. 2d 764].)

---

[1]Advance Report Citation: 51 A. C. 73, 75.

[2]Advance Report Citation: 53 A. C. 161, 173.

The record is clear that the defense was well aware during the course of the trial that the complaining witnesses had reported the offenses to the police, and that some of them had been taken to hospitals where they were examined and presumably made statements. No reason appears from the record, and none is suggested, for not having made a motion for production during the course of the trial. A defendant may not gamble on a favorable verdict and take advantage of his want of diligence in the event it is unfavorable.

We are of the opinion defendant waived any right he had to compel production of the documents; and that his motion, made long after the verdicts were rendered, was not timely. There was no denial of due process. A defendant in a criminal case has many rights, the denial of which to him would constitute a denial of due process, and yet he may waive such rights without its affecting due process. Rights of a defendant which may be waived without affecting due process are: to be brought to trial within 60 days after the filing of the information; to a public trial; to any trial at all by a plea of guilty; to trial by jury; to be confronted with the witnesses against him; to defend with counsel; to be put in jeopardy only once for the same offense by failure to raise the plea. (*In re* Baird, 150 Cal. App. 2d 561, 570-571 [310 P. 2d 454] and cases there cited; People v. Rogers, 150 Cal. App. 2d 403, 410-415 [309 P. 2d 949; People v. Brown, 145 Cal. App. 2d 778, 780-781 [—— P. 2d——]; People v. Johns, [1]173 Cal. App. 2d ——, ——-—— [343 P. 2d 92].) Under the circumstances the court did not abuse its discretion in denying the motions for production and inspection of the documents.

---

[1]Advance Report Citation: 173 A. C. A. 37, 44-45.

The facts with respect to count I, which charged kidnaping for the purpose of robbery, were these: On December 20, 1956 Mrs. Scott, a married woman, was alone in her apartment with her 6-month-old baby, and had put the baby to bed. About 9 p.m. defendant forced his way into the apartment. He lunged forward "with his face contorting into that of a maniac." He pulled a gun with one hand, and with the other thrust Mrs. Scott's head back until she thought it would break. At the point of the gun he directed her to remove all her clothing, threatened to kill her and the baby, and accomplished an act of sexual intercourse. He then asked her if she had any money in the house, and said he wanted everything she had. She told him her purse was in the bedroom. Defendant ordered her to go to the bedroom. He followed her through the hall about 40 feet into the bedroom where she found her purse. She gave him $8.00 and he took her engagement and wedding rings which he forced her to remove from her finger. He had the gun in his hand at all times.

Penal Code section 209, provides:

"Any person who . . . kidnaps or carries away any individual to commit robbery . . . is guilty of a felony. . . ."

The second assignment of error is that the "facts do not support an 'asportation' as contemplated by section 209." The point is without merit. In People v. Wein, 50 Cal. 2d 383 [326 P. 2d 457], it was contended that by section 209 the Legislature intended that the movement be over a substantial distance and not merely between the rooms in a dwelling. The court answered (p. 400):

"Here, the testimony of some of the victims fixed the amounts of movement at distances ranging from a few

feet up to more than 50 feet. Under the reasoning and language of the Chessman case [38 Cal. 2d 166 [238 P. 2d 1001]], any of these distances sufficed for a conviction under the challenged section. This conduct went beyond a mere detention during the course of an armed robbery, which is no longer punishable by death. (See People v. Taylor, 135 Cal. App. 2d 201 [286 P. 2d 952].) To the extent that defendant's argument is predicated on legislative intent, it must be noted that the Legislature has been in session several times since the Chessman case was decided, and it has not seen fit to amend the kidnaping law to limit the rule we announced. If the section, as interpreted by this court, is regarded as too harsh, the remedy is for the Legislature to redefine kidnaping, and not for this court to engraft some uncertain distance limitation onto the plain language of the section. (See People v. Knowles, 35 Cal. 2d 175, 180-183 [217 P. 2d 1].)"

People v. Weis, *supra*, was followed in People v. Chessman, [52 Cal. 2d 467, 498 [341 P. 2d 679]]. The facts with respect to count I make a clear case of kidnaping for the purpose of robbery.

Defendant also attacks the constitutionality of section 209. It was held constitutional in People v. Wein, *supra*, 50 Cal. 2d 383, 401.

The third assignment of error is that the court erred in denying the motion for a new trial on the ground of newly discovered evidence. Count XI charged defendant with attempted rape of a high school student on February 13, 1958. The student testified that, when she succeeded in escaping from the clutches of defendant, she

[1] Words Reporter Citation: 52 A. C. 481, 512.

left a schoolbook and a notebook on the floor of defendant's automobile near the rear seat where she had put them at defendant's direction. On defendant's arrest, the schoolbook and notebook were found in the trunk of his car.

Defendant testified he found the schoolbook and notebook together with a cartridge of rifle shells, a fountain pen, and a comb, behind Sears' store on Western and Melrose in Hollywood; that his mother was present. Defendant's mother testified to the same effect. On the day of his arrest defendant told a police officer no one was with him when he assertedly found the schoolbook and the notebook.

At the hearing of the motion for a new trial defendant produced two witnesses who testified they were fellow sailors on leave in the Los Angeles area the afternoon of February 14, 1958; that they saw defendant, or a person resembling defendant, pick up some articles, including a couple of books, in the parking lot of Sears' store in Hollywood and put them in a Cadillac automobile. Defendant's argument, in effect, is that the trial judge should have believed the testimony of these witnesses and, accordingly, granted a new trial.

These requirements must be fulfilled for the granting of a new trial on the ground of newly discovered evidence: (1) the evidence and not merely its materiality must be newly discovered; (2) the evidence must not be merely cumulative; (3) a different result must be probable on a retrial of the cause; (4) the party could not with reasonable diligence have discovered and produced it at the trial; (5) these facts must be shown by the best evidence which the case admits. (People v. Sutton, 73 Cal. 243, 247 [15 P. 86]; People v. Beard, 46 Cal. 2d

278, 281 [294 P. 2d 29]; People v. Warren, [1]175 Cal. App. 2d ——, —— [346 P. 2d 64].) A motion for a new trial on the ground of newly discovered evidence is looked upon with disfavor, and the trial court's ruling in that regard will not be disturbed except upon a clear showing of an abuse of discretion. (People v. Miller, 37 Cal. 2d 801, 807 [236 P. 2d 137]; People v. Greenwood, 47 Cal. 2d 819, 821 [306 P. 2d 427]; People v. Patterson, 169 Cal. App. 2d 179, 187 [337 P. 2d 163].)

It was for the trial judge to weigh the effect of the testimony of the two witnesses. He disbelieved their stories.* They reflected a number of uncertainties and inconsistencies and may not have been at all persuasive. Further, the trial judge may have concluded that defendant could have with reasonable diligence discovered and produced the evidence at the trial or that their testimony was such that a different result would not be probable on a retrial. There is nothing to suggest that he in any way abused his discretion.

The final assignment of error is that the People suppressed evidence and thereby denied defendant a fair trial. On the motion for a new trial, the affidavit set out in the margin was filed.† Defendant contends the

---

[1]Advance Report Citation: 175 A. C. A. 258, 269.

*The trial judge said: "I didn't believe them. I thought they were lying like rugs."

†"That affiant is one of the attorneys [the attorney associated about a month after verdicts returned] for the defendant herein above named; that heretofore affiant received information that the arrest police reports and the complaints made by the complaining witnesses to the various law enforcement agencies involved in the investigation of the crimes charged herein, are at variance with the actual evidence introduced by the prosecution, in that the descriptions of the participants did not describe the defendant, and the descriptions of the car involved did not describe the car belonging to defendant, and that the manner in which the crime was committed

testimony of a Miss Stone (the complaining witness in count VI, kidnaping, and count VII, rape) was replete with discrepancies, and that the failure of the district attorney to disclose the same was tantamount to the suppression of evidence and to the offering of evidence by the People with knowledge of its falsity. There is no compulsion on the prosecution to call any particular witness or not to call a witness who may have made inconsistent statements so long as there is fairly presented to the court the material evidence bearing on the charge for which the defendant is on trial. (People v. Tuthill, 31 Cal. 2d 92, 98 [187 P. 2d 16]; *In re* Horowitz, 33 Cal. 2d 534, 539-541 [203 P. 2d 513]; People v. Wein, 50 Cal. 2d 383, 402-403 [326 P. 2d 457]; People v. Parry, 105 Cal. App. 2d 319, 322-323 [232 P. 2d 899]; People v. McDaniel, 157 Cal. App. 2d 492, 500 [321 P. 2d 497]. Also see People v. Rickson, 112 Cal. App. 2d 475, 479 [246 P. 2d 700]; People v. Chapin, 145 Cal. App. 2d 740, 748 [303 P. 2d 365].) The record is devoid of any showing of perjury. And there is no evidence in the record that any false testimony was

---

did not coincide with the manner testified to in court; that affiant does not know the truth of this information and cannot know the truth thereof until and unless said documents, police reports, statements to police agencies, hospital and medical reports are produced and examined; that the complete police and investigative report of the Glendale Police Department with respect by the witness Cecelia Rae Stone has been made available to affiant and attached hereto are some excerpts from that report which are hereby made a part hereof to illustrate the contentions of affiant and the defendant; that a copy of said report is available for introduction into evidence if the court so desires; that affiant is informed and believes and, therefore avers that the production of said documents, etc., will reveal that the defendant has not been afforded a fair and impartial trial by the prosecution, and the various investigative agencies;

"That affiant believes that said documents are necessary and material in order to adequately conduct the motion for a new trial."

knowingly or otherwise caused or suffered to be introduced at the trial by any representative of the State. Defendant was fairly tried and the evidence of his guilt of the offenses for which he was convicted was overwhelming.

The judgment and the order denying a new trial are affirmed.

SHINN, *P. J.*, and FORD, *J.*, concurred.

Penal Code of California, Section 207.

Kidnaping defined

Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free will and consent of such persuaded person; and every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where such act is committed, and brings, sends, or conveys such person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnaping.

Penal Code of California, Section 209.

Punishment, kidnapping for ransom, extortion, or robbery; bodily harm

Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who

aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole.

Penal Code of California, Section 211.

Robbery Defined

Robbery is the felonious taking of personal property of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

Penal Code of California, Section 261.4.

Rape Defined

4. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or anaesthetic, substance, administered by or with the privity of the accused.

Penal Code of California, Section 664.

Attempts, punishment

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration

thereof, is punishable, where no provision is made by law for the punishment of such attempts as follows:

1. Offense punishable by five years or more. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted: provided, however, that if the crime attempted is one in which there is no maximum sentence set by law or in which the maximum sentence is life imprisonment or death the person guilty of such attempt shall be punishable by imprisonment in the state prison for a term of not more than 20 years.

2. Offense punishable by less than five years. If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year.

3. Offense punishable by fine. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted.

4. Offense punishable by imprisonment and fine. If the offense so attempted is punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half the longest term of imprisonment and one-half the largest fine which may be imposed upon a conviction of the offense so attempted.